Citation: *R. v. Jibril*, 2019 YKTC 28

Date: 20190614
Docket: 17-00215A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

JIBRIL HOSH JIBRIL

Appearances:
Benjamin Eberhard — Counsel for the Crown
David Chow — Counsel for the Defence

RULING ON APPLICATION

[1] Jibril Jibril has been charged with having committed offences contrary to ss. 5(1) and (2) of the *Controlled Drugs and Substances Act,* S.C. 1996, c.19.

[2] The trial commenced May 21, 2019. Crown counsel called four witnesses.

[3] At the conclusion of the Crown's case an issue arose which resulted in Crown counsel bringing an adjournment application. The purpose of the adjournment would be to obtain additional evidence that the Crown would then seek to adduce at trial, if successful on an application to re-open the Crown's case.

[4] I denied the Crown's adjournment application, stating that my reasons for doing so would follow. These are my reasons.

[5] The evidence before the Court was that a Greyhound employee became suspicious of a package that was brought in for delivery to Lethbridge, Alberta. As a result of his suspicion, and pursuant to Greyhound policy, the employee opened the package.

[6] Based upon his observations of some of the contents of the package, the employee then contacted the RCMP.

[7] Cst. Stelter attended at the Greyhound station and further examined the package. One of the items located inside the package was a plastic bag with six smaller sandwich-style plastic bags inside it. Each of these smaller bags contained a number of pills, subsequently determined to be fentanyl.

[8] Reserve Cst. Massie, who was qualified at trial as an expert in the detection, analysis, comparison, and identification of friction ridge impressions, in layman's terms a fingerprint expert, examined the items in the package and was able to obtain three fingerprint friction ridge impressions. Two of these fingerprint impressions came from the plastic bags containing the fentanyl pills. These fingerprint impressions were designated as R1, R2, and R3.

[9] These fingerprint impressions were submitted to the national databank in Ottawa. Information was received that one of the fingerprint impressions, R2, was noted to have been a hit with fingerprints that had been taken in 2013 in Saskatoon, Saskatchewan. These fingerprints were on a C-216 document (the "Saskatoon C-216").

[10] Reserve Cst. Massie pulled the Saskatoon C-216 from an electronic file. She was subsequently mailed a copy of the Saskatoon C-216 from Ottawa. She never had any contact with the individual who actually rolled the print on the Saskatoon C-216.

[11] The name on the Saskatoon C-216, purporting to be that of the individual from whom the fingerprint impressions had been taken, was that of a Jibril Jibril.

[12] Based upon this information, Cst. Manweiller was able to obtain a photograph of Mr. Jibril, the accused before the Court, from the Drumheller Institute. This photograph was then utilized to identify Mr. Jibril in Whitehorse, where he was arrested on June 30, 2017.

[13] Reserve Cst. Massie conducted a comparative analysis of the fingerprint impression identification on the Saskatoon C-216 and R2. She concluded that the R2 fingerprint impression was a match with the left ring finger impression on the Saskatoon C-216, and was therefore made by the same individual.

[14] Reserve Cst. Massie prepared a Friction Ridge Analysis Report (the “Report”), which was filed as an Exhibit at trial.

[15] Reserve Cst. Massie testified that, following the completion of the Report, she was provided with the fingerprint impressions that were obtained from Mr. Jibril following his arrest on June 30, 2017, as noted on a C-216 form (the “Whitehorse C-216”). She received the Whitehorse C-216 after completing the Report. She then compared these fingerprint impressions with the Saskatoon C-216 fingerprint impressions. She

concluded that the fingerprint impressions from both C-216's were made by the same individual.

[16] Reserve Cst. Massie testified that she prepared a 2666 report in this regard. It appears from the evidence that the only indication that she had made anyone aware that she had compared the Saskatoon and Whitehorse C-216's was in a short two-paragraph ident occurrence report to Crown counsel that was disclosed to counsel for Mr. Jibril. This occurrence report e-mail was not filed as an Exhibit at trial.

[17] Reserve Cst. Massie did not, however, prepare a report with respect to the comparative analysis between the Saskatoon and Whitehorse C-216 form fingerprint impressions that was equivalent to the Report comparing the Saskatoon C-216 and R2 fingerprint impressions. She did not make any notes as to how the Saskatoon and Whitehorse C-216 fingerprint impressions were compared to each other, and how she therefore concluded that they originated from the same individual.

[18] Reserve Cst. Massie was also unable to say which fingerprint impressions from the Saskatoon C-216 were used to compare to the Whitehorse C-216 in concluding that the fingerprint impressions were obtained from the same person.

[19] During the testimony of Reserve Cst. Massie, it became apparent that in the course of providing disclosure, the RCMP had not given the Crown a copy of the entire Saskatoon C-216, choosing instead to provide only a copy of the single fingerprint impression that was purported to be a match to R2. As such, the first time either Crown or Defence counsel saw the Saskatoon C-216 was mid-trial.

[20] At the conclusion of the testimony of Reserve Cst. Massie, Crown counsel attempted to file as Exhibits both the Saskatoon C-216 and the fingerprint impression taken from the Saskatoon C-216 and used to identify a match to R2. Counsel for Mr. Jibril objected to these documents being admitted into evidence on the basis that these were hearsay documents and were insufficiently reliable to meet the criteria for admission.

[21] Counsel made submissions on the issue of admissibility and I adjourned the matter over to the next day in order to determine whether I would be in a position to provide a ruling on admissibility.

[22] Prior to adjourning the matter, however, I enquired of counsel whether there was expected to be any more evidence called, regardless of my decision on the issue of admissibility. I was advised by Crown counsel that the Crown had no more witnesses or evidence to adduce, beyond the two impugned documents. Counsel for Mr. Jibril indicated that the Defence was not calling evidence.

[23] The following morning I provided counsel with some jurisprudence, and indicated that I was prepared to allow counsel to make further submissions on the issue of admissibility if counsel wished to do so. The matter was then stood down until the afternoon.

[24] When the proceeding resumed in the afternoon, Crown counsel brought an application to adjourn the trial. The basis for the application was two-fold: firstly counsel wished to provide evidence from the police officer who had prepared the Saskatoon C-216.

[25] Secondly, counsel had spoken with Reserve Cst. Massie and was advised that she could prepare a report outlining the steps she had taken that caused her to conclude the fingerprint impressions from the Saskatoon C-216 and Whitehorse C-216 originated from the same person.

[26] Counsel had been able to locate and speak with the police officer who had taken the fingerprint impressions on the Saskatoon C-216, and advised the court that, if an adjournment was granted, he expected to be able to provide relevant evidence from this police officer that would address issues of reliability in regard to the Saskatoon C-216.

[27] In essence, this aspect of the adjournment application was in order to allow the time required for the Crown to obtain the necessary evidence in order to re-open its case to allow for this evidence to be presented at trial. The time that the Crown expected would be required to obtain this evidence would be fairly brief.

[28] With respect to the second aspect of the adjournment application, Crown counsel submitted that a decision as to whether to bring an application to re-open the Crown's case would be made after receiving this further information from Reserve Cst. Massie.

[29] In essence this aspect of the adjournment application was to allow for the Crown to obtain further evidence, assess the nature of this evidence, and then decide whether to bring a further application to re-open its case in order to allow for this evidence to be presented at trial. I understood that the time required to do so would not necessarily be unduly lengthy.

[30] The matter was then adjourned over to the following morning in order to allow for submissions on whether the Crown application for an adjournment of the trial should be granted. In this regard, counsel was to make submissions as to whether the Crown should be allowed to re-open its case in order to call the evidence the Crown either knew it was in a position to obtain in regard to the Saskatoon C-216, or that the Crown may possibly wish to adduce, depending on the Crown's assessment of the further report Reserve Cst. Massie was prepared to provide.

[31] After hearing counsels' submissions, I denied the Crown adjournment application. In doing so I held that the Crown was unable to meet the requisite test as set out in the jurisprudence with respect to being allowed to re-open its case.

[32] In considering whether or not to grant the Crown application for an adjournment, I first considered the nature of the evidence which the Crown intended to adduce in regard to the reliability of the Saskatoon C-216. I further considered the nature of the evidence that the Crown may ultimately have been able to adduce, assuming for this purpose that Reserve Cst. Massie's report would have provided the Crown with relevant and probative evidence that supported the Crown's position that the fingerprints on the two C-216's originated from the same person.

[33] I considered it appropriate to consider the merits of a Crown application to re-open its case to call further evidence, as there would be no basis for allowing an adjournment in order to attempt to obtain evidence that in any event would not be allowed to be introduced at trial, if the Crown was unable to be successful in an application to re-open its case to call this evidence.

Analysis

[34] The leading authorities with respect to the Crown being allowed to re-open its case are ***R.*** v. ***P.(M.B.)***, [1994] 1 S.C.R. 555 and ***R.*** v. ***S.G.G.***, [1997] 2 S.C.R. 716.

[35] As stated in paras. 29 - 31 of ***S.G.G.***,

> **29** The decision of a trial judge to allow the Crown to reopen its case at any time prior to a verdict is discretionary, and as a result will generally be accorded deference. However, that discretion must be exercised judicially, and in the interests of justice: P. (M.B.), supra, at pp. 568-69. Long before the Canadian Charter of Rights and Freedoms it was recognized that the reopening of the Crown's case posed a number of dangers to the fairness of the trial. See for example R. v. Kishen Singh (1941), 76 C.C.C. 248 (B.C.C.A.) per Sloan J.A. Now that the accused's rights to a fair trial are constitutionally protected, courts must be even more vigilant in protecting those interests. The crucial question to be resolved upon an application to reopen the Crown's case is "whether the accused will suffer prejudice in the legal sense -- that is, will be prejudiced in his or her defence": P. (M.B.), supra, at p. 568.
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> **30** The ambit of a trial judge's discretion to allow the Crown to reopen its case becomes narrower as the trial proceeds because of the increasing likelihood of prejudice to the accused's defence as the trial progresses. During the first stage, when the Crown has not yet closed its case, the trial judge's discretion is quite broad. At the second stage, which arises when the Crown has just closed its case but the defence has not yet elected whether or not to call evidence, the discretion is more limited. Finally, in the third phase -- where the defence has already begun to answer the Crown's case -- the discretion is extremely narrow, and is "far less likely to be exercised in favour of the Crown". The emphasis during the third phase must be on the protection of the accused's interests. See P. (M.B.), at p. 570….

[36] With respect to allowing the Crown to re-open its case in the third stage, the Court further stated in para. 35:

> Although Lamer C.J. in P. (M.B.) was careful to leave open the possibility that reopening during the third phase of the trial may be permissible in other circumstances, he was equally clear that these circumstances would

> be rare. In my view, reopening at this stage should only be permitted in those very exceptional cases that are closely analogous to the examples given in P. (M.B.) -- in other words, where the absence of prejudice to the accused is manifestly obvious. Beyond these examples, it will be extremely difficult for the Crown to succeed in an application to reopen the case once the accused has begun to answer the Crown's case.

[37] A Crown application to re-open in the present case is somewhat similar to what occurred in ***R.*** v. ***Gowing***, 2012 ABPC 38. In ***Gowing***, a drug trafficking case, the entirety of the evidence was heard in a *voir dire*, with agreement that the complete Crown case would be put in during the *voir dire* and that the evidence from the *voir dire* would become evidence at the trial proper. Following the completion of the *voir dire*, counsel would make submissions, and the decision on the *voir dire* would be determinative of the matter.

[38] After Crown had adduced all its evidence, the *voir dire* was adjourned for defence counsel to decide whether to call evidence on the *voir dire* or not. Four days after the adjournment, the Crown gave notice of its intent to seek to re-open its case to call further evidence.

[39] Although the Crown's notice of intention to apply to re-open its case was provided prior to Defence counsel deciding whether to call evidence or not, the Crown did not actually file their argument and authorities until after Defence counsel disclosed that the Defence would not be calling evidence on the *voir dire*.

[40] The Court concluded that the application was made after the second stage of proceedings but prior to the third stage commencing (paras. 27, 79, 80).

[41] I note that the manner in which the question of the admissibility of the impugned documents arose in the present case is somewhat out of the normal, in that a *voir dire* was never entered into during the course of the trial. That would have been the usual procedure. However, as a judge sitting alone without a jury, I am satisfied that this procedural anomaly is not problematic with respect to my providing a decision on the Crown's adjournment application.

[42] Crown counsel had stated that he had no further evidence to call. Counsel for Mr. Jibril stated that the Defence did not intend to call any evidence. Both counsel stated that no further evidence was to be called regardless of my decision on the issue of the admissibility of the two impugned documents. The possibility of counsel making submissions regarding whether these documents should be admissible or inadmissible was discussed, in the event I wished to reserve further on the issue of admissibility.

[43] Defence counsel asserts, and Crown counsel has conceded, that in this case an application to re-open the Crown's case would be during the third stage of proceedings. I agree. Although the decision on admissibility had not been made, the Crown had closed its case insofar as calling evidence and Defence counsel had stated that he did not intend to call any evidence. This is one step further along than was the case in ***Gowing***.

[44] In ***Gowing*** the Court states in paras. 16 and 17 as follows:

> 16 At the third stage, discretion is considerably narrowed. Historically the discretion was limited to what is called an *ex improviso* limitation, meaning that reopening would only be allowed for some matter that no human ingenuity could have foreseen.

> 17 Although that may no longer be strictly true, re-opening is rare at that stage. Nevertheless, the two most common exceptions referred to in the authorities, are where the conduct of the Defence had contributed directly or indirectly to the Crown's failure to adduce certain evidence, or secondly where the Crown's error or omission relates to a purely formal or technical matter not relevant to the substance or merits of the case (***P. (M.B.)*** para. 30).

[45] As is stated in ***P.(M.B.)*** in para. 23:

> 23 Lastly, in the third phase after the Crown has closed its case and the defence has started to answer the case against it (or, as in much of the case law, the defence has actually closed its case), a court's discretion is very restricted and is far less likely to be exercised in favour of the Crown. It will only be in the narrowest of circumstances that the Crown will be permitted to reopen its case. Traditionally, an ex improviso limitation was said to apply to this stage of the proceeding; that is, the Crown was only allowed to reopen if some matter arose which no human ingenuity could have foreseen. At this late stage, the question of what "justice" requires will be directed much more to protecting the interests of the accused than to serving the often wider societal interests represented by the Crown, the latter being a more pressing consideration at the first and, to a lesser extent, the second phase.

[46] Crown counsel conceded in ***Gowing***, and the Court agreed, that the evidence it sought to adduce if allowed to re-open its case was not purely formal or in regard to a procedural matter (paras. 33 and 34).

[47] The Court stated in paras. 74 and 75 that:

> 74 I find the requested re-opening here relates neither to a technical or procedural matter nor is it related to allowing recovery from having been misled even indirectly by the Defence. Rather, the purpose is to allow the Crown to correct a mistake or fill a gap in its case that it failed to anticipate earlier.
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> …
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> 75 As pointed out in ***Wu*** the fundamental concern is trial fairness (para. 57). The keystone principle as Justice Lamer said in ***P.(M.B.)*** (para. 20) is

> whether the accused will suffer prejudice in the legal sense, will he or she be prejudiced in his or her defence.

Nature of the Proposed evidence

Saskatoon C-216

[48] The Saskatoon C-216 from which the fingerprint impression that Reserve Cst. Massie used in determining that R2 originated from the same individual lacks detail. It identifies the individual providing the fingerprints as being Jibril Jibril. It does not identify an address. While it provides date of birth, sex, eye colour, height and weight, it does not identify race, complexion, place of birth, or date of arrest. Significantly, it does not have a photograph of Jibril Jibril or identify the individual who obtained the fingerprints or have this individual's signature.

[49] By contrast, the Whitehorse C-216, contains all of the above, with the exception that there is not a place of birth and, while Cst. Manweiller is identified as the individual who obtained the fingerprints, she has not signed the C-216.

[50] There is a real question as to the reliability of the Saskatoon C-216, and the Crown application for an adjournment to be allowed to re-open its case is an attempt to essentially shore up the reliability of this document. This falls, in my opinion, within the ambit of attempting to correct an omission in the Crown's case.

[51] This omission was not caused by any conduct of the Defence; in fact it was clear prior to the trial commencing that a challenge to the fingerprint identification evidence would be the focus of the Defence case. There is no reason that the evidence the

Crown wishes to adduce, if allowed to re-open its case, could not have been called before the Crown closed its case.

[52] It is incumbent on the Crown to call, as part of its case, all the evidence required to prove the facts upon which the Crown intends to rely in order to seek a conviction (***R.*** v. ***G.P.***, [1996] 31 O.R. (3d) 504 (C.A.)).

[53] The evidence sought to be adduced here is evidence that is a matter of substance, and not merely of a formal or procedural nature.

[54] I appreciate that the RCMP did not disclose the Saskatoon C-216 to Crown counsel, and therefore counsel was not aware prior to the trial of the deficiencies in this document and that Crown counsel assumed carriage of this file somewhat later in the process of this matter coming to trial. However, this does not change the fact that this evidence could have and should have been adduced at trial in the Crown's case.

[55] Therefore, I am declining the Crown's application to adjourn the trial in order to re-open its case to call evidence relevant to the reliability of the Saskatoon C-216.

Report from Reserve Cst. Massie

[56] I appreciate that I am actually dealing with an adjournment application in order to allow Crown to obtain a report from Reserve Cst. Massie, that would then possibly form the basis for an application to re-open the Crown's case to call this evidence.

[57] As I stated earlier, I consider it appropriate to assess at this stage the merits of the application to re-open, assuming that relevant and probative evidence for the Crown's case would be provided by Reserve Cst. Massie.

[58] The Whitehorse C-216, which clearly identifies Mr. Jibril, was not used for the comparison fingerprint impression analysis with the R2 fingerprint. Only the Saskatoon C-216 was used for comparison to R2.

[59] Reserve Cst. Massie testified that she advised the investigators that a set of fingerprints needed to be taken in relation to the offence with which Mr. Jibril was charged in Whitehorse for comparison and confirmation of identity.

[60] Reserve Cst. Massie received the Whitehorse C-216 approximately one month after she had provided the Report. She sent a two-paragraph report to Crown counsel, that was disclosed to Defence counsel, in which she said that the person who provided the fingerprint impressions in the Saskatoon C-216 was the same person who provided the fingerprint impressions in the Whitehorse C-216. She did not say, however, how she reached that conclusion, and she did not provide any detail in that regard.

[61] The Crown application is for the purpose of obtaining a further report from Reserve Cst. Massie in order to determine whether an application to re-open the Crown's case to adduce that evidence should be made.

[62] Assuming that Reserve Cst. Massie would be able to provide the Crown with a detailed report that was able to show how she concluded that the Saskatoon and Whitehorse C-216 fingerprint impressions were made by the same person, which I

consider would be relevant and probative evidence, this is evidence that could have been provided at trial. There is no good reason why it was not. Allowing the Crown to re-open its case in order to adduce this evidence, would be allowing the Crown to correct a deficiency in its case that is not merely formal or procedural.

[63] It was made clear well before the trial started that the foundation of the case for Mr. Jibril in his defence was to be a challenge to the fingerprint impression evidence that is at the core of the Crown's case against him. The Defence case was premised on this challenge.

[64] Mr. Jibril was entitled to rely on the disclosure provided by the Crown in understanding what the case the Crown was going to present against him was, and what the evidence the Crown would be relying on in order to seek to obtain a conviction against him would be. His communications with counsel and the instructions he provided to counsel were, I expect, likely based upon his understanding of the Crown's evidence, as disclosed, in their case against him.

[65] Allowing the Crown to re-open its case to call further evidence from Reserve Cst. Massie, in order to fix a problem with the Crown's case on a matter that was not caused or contributed to by any conduct of the Defense and is not simply a formal or procedural matter, and is evidence that could have been adduced by the Crown in presenting its case in chief, would be highly prejudicial to Mr. Jibril's right to make full answer and defence.

[66] The jurisprudence is clear that at the third stage of proceedings, the prejudice to the interests of the accused and his or her right to make full answer and defence is the paramount consideration.

[67] Allowing the Crown to re-open its case at this stage in these circumstances would be contrary to law.

[68] As such, I decline to grant the Crown's application for an adjournment in order to obtain and assess further evidence from Reserve Cst. Massie.

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COZENS T.C.J.